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Supreme Court Of The United States

October Term 1968

No. 1271

KENNETH H. DOLLERIS, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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KENNETH H. DOLLERIS, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Kenneth H. Dolleris, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

The District Court filed no opinion. The Opinion of the Court of Appeals (Pages 1a-9a this Petition) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1969 (added transcript to Volume II of

the pleadings). An order staying the mandate of the Court of Appeals thirty (30) days from April 8, 1969 was entered on April 8, 1969 (R. ____). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Was petitioner's privilege to remain silent denied by the admission of B. Morgan's testimony for the government which informed the jury that petitioner did not talk to the revenue agents about this case after special agent McLellan warned petitioner of his constitutional right to remain silent on October 18, 1965, and by the trial court's instructions on that right to the jury?

2. Was petitioner denied a fair trial by the judgment of guilty which is not supported by any evidence that tends to prove petitioner guilty?

CONSTITUTION AND STATUTES INVOLVED

Amendments to the Constitution.

"Art. V.—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be witness against himself, nor be deprived of life, liberty, or property, with-

out due process of law; nor shall private property be taken for public use without just compensation."

26 United States Code Section 7201.

"Sec. 7201. Attempt to Evade or Defeat Tax.

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 United States Code Section 7206 (1).

"Sec. 7206. Fraud and False Statements.

"Any person who—

"(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

26 United State Code Section 7608 (b) (1) and (2) (A) (B).

"Sec. 7608 * * * (b) Enforcement of Laws

Relating to Internal Revenue other than subtitle E.—

"(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

"(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

"(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

"(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony;"

STATEMENT

The indictment as specified by the Bill of Particulars (R. 5a, 19a), charged that petitioner omitted to

report for taxes $43,550.50 which he received from two of his corporation's customers, Louisville Scrap Material Company and Brodey and Brodey, Inc. of Indianapolis, Indiana, during the taxable years January 31, 1961, through January 31, 1965.

Government produced evidence that petitioner received $48,007.50 in currency in payment of thirty-six cash sales of scrap metal which he made to his corporation's two customers. (Gov. Exh. 32, 33).

Petitioner produced his corporation's Cash Receipts Journal (of D. & W. Sales & Service, Inc.) from which Mr. Robert Button testified and recited twenty-six entries in the journal recording the receipt of $51,286.51 in currency from cash sales which were made during the period involved. (Defendant's Exhibits 3 and 4, App. 299-301).

Mr. Durbin Oldham, who prepared the tax returns, testified for the government and stated that the amounts of all entries made in the Journal were reported in the tax returns. (R. 84, 76a).

Petitioner's company had only two products for sale, (1) finished auto parts, and (2) scrap metal. All auto parts were sold to customers on credit accounts except occasional sales were made for checks payable to the corporation. None were made for currency. All sales of scrap metal were cash sales payable in currency (two checks were payable to cash) or by check payable to the corporation. (R. 322-338, 237a-241a).

No evidence was produced that any cash sales of scrap were made for currency to any person or firm

other than to Louisville Scrap Material Company or to Brodey and Brodey. No evidence was produced that auto parts were sold for currency. Consequently, Mr. B. Morgan for the government, Mr. Durbin Oldham for the government, and Mr. Robert Button for petitioner, each testified that he could not say that the government's figure of $48,007.50 was not included in the petitioner's figure of $51,286.51.

During petitioner's trial, revenue agent, B. Morgan, for the government, was permitted to testify:

1(a) Revenue agent B. Morgan and special agent McLellan held a conference with petitioner and with petitioner's counsel Lee S. Jones on October 18, 1965.

(b) Special agent McLellan warned petitioner that under the Constitution he had the right to refuse to answer any question which he thought might incriminate him. (R. 250-188a).

(c) Petitioner's counsel thereupon advised petitioner not to answer any questions because they might be used against him. (R. 249, 188a).

(d) B. Morgan recited the questions asked and the answers given in this conference to inform the jury that petitioner's counsel answered all the questions and to make clear to the jury that petitioner remained silent after he was warned and advised of his right to remain silent. (R. 250-253, 188a-190a).

2(a) A conference was held on October 27, 1965, and special agent McLellan, B. Morgan, and petitioner's counsel were present. (R. 250-253, 188a-199a).

(b) B. Morgan recited to the jury that this case

was discussed by the three persons who were present which made clear to the jury that the agents had offered the petitioner an opportunity to talk to them about this case, but that he declined to do so. (R. 253-255, 190a-191a).

3(a) A conference was held on May 3, 1966, and special agent McLellan, B. Morgan, and petitioner's counsel were present and the three persons discussed this case.

4(a) A conference was held on September 15, 1966, and special agent McLellan, B. Morgan, Mr. Cecil, Intelligence Division group supervisor, and petitioner's counsel were present. (R. 258, 193a).

(b) Mr. Morgan testified:

> "A Well, on September 15, 1966, Mr. Jones came to the office of the Intelligence Division for a conference with Mr. Cecil, who is Intelligence Division Group Supervisor, and Mr. McLellan and myself.
>
> "Q Mr. Dolleris invited?
>
> "By the Court: Was—was Mr. Dolleris there?
>
> "A No.
>
> "Q Was he invited?
>
> "A He was invited, but he did not come." (R. 258, 193a).

(Court adjourned).

(Court convened).

> "Q Now, Mr. Morgan, I'd like to direct your attention to the meeting of September the 15th, 1966. "Now, if you would, tell us once again who was present at that meeting?

"A At that meeting, Mr. Cecil, Intelligence Division Group Supervisor—

"Q (Interrupting) Is this the gentleman seated at counsel table here (Indicating Mr. Cecil)?

"A Yes, it is. Mr. McLellan, Special Agent, Mr. Jones and myself.

"Q Now, was Mr. Dolleris asked to come to this meeting?

"A Yes, he was invited to the meeting, but he did not appear.

"Q At this meeting was Mr. Jones advised that a recommendation for prosecution was being considered?

"A Yes, he was. * * *" (R. 261-262, 195a-196a). Before the Court in Chambers).

"Mr. Smith: Of course, Judge, one—in the light of this next statement that I want to tell you, it becomes very important. Whenever Mr. Jones was with Mr. Dolleris, Mr. Jones, as he's entitled to, instructed Mr. Dolleris not to talk to us. So you can't investigate somebody and just carry on a one-sided conversation." (R. 272, 202a-203a).

Mrs. Ailene Gourley for the government testified:

"Q Okay. Now, who is your attorney?

"A Well, Mr. Jones is representing the company.

"Q He represents you, too, I assume?

"A Yes, sir.

"Q Were you advised not to talk to the agents by Mr. Jones?

"Mr. Jones: Your Honor, we've got a witness

here to—Your Honor, we have a witness who is on the stand, and the question has been asked—

"By the Court: (Interrupting) What question?

"Mr. Smith: I asked her was she advised not to talk to these agents by Mr. Jones.

"Mr. Jones: My point, she's here to answer—

"By the Court: (Interrupting) Well, she can answer then.

"Mr. Jones: All right, sir.

"The Witness: Was I advised not to?

"Q Yes, ma'am.

"A Yes, sir." (R. 234, 177a).

The Trial Court instructed the jury at the close of the case as follows:

> "One other thing, ladies and gentlemen, the fact that this defendant did not take the stand in his own defense is a circumstance that shall not be considered by you and you shall not discuss it even in your deliberations in the jury room." (R. 399, 290a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the Fifth Amendment of the Constitution of the United States.

Government presented to the jury a dialogue between the prosecutor and the witness, B. Morgan, which informed the jury that a pretrial event occurred in this case, and being the fact that the petitioner remained silent when B. Morgan, a revenue agent, and special agent McLellan confronted him to inquire

of criminal fraud and evasion of tax in this case on October 18, 1965. The witness informed the jury that special agent McLellan then warned the petitioner of his right to be silent, and also that his counsel advised him not to answer any questions of the agents and further that thereafter all questions of the agents were answered by petitioner's counsel.

In *Miranda* v. *Arizona*, 384 U.S. 436, 468; 16 L. Ed. 2d 694; 86 S. Ct. 1602, this Court said:

> "The prosecution may not, therefore, use at the trial the fact that he stood mute or claimed his privilege in the face of accusations." (Note 37).

The prosecution presented to the jury this evidence of what transpired in a series of conferences which the two revenue agents held for the purpose of hearing the petitioner talk about this case, beginning with the warning and advice in the first conference and continuing from one conference to the next one as repeated opportunities for the petitioner to talk to them. The witness expressed to the jury a duty on petitioner to talk about his case and emphasized the duty in the mind of the jury by using the word "invited" four times in testifying about the fourth conference which was held on September 15, 1966. (R. 258-262, 193a-196a). The Trial Court's question: "Was Mr. Dolleris there?" clearly had a forceful meaning to the jury. (R. 258, 194a).

The evidence of the prosecution's procedure and its resulting conclusion to recommend prosecution, after

the petitioner declined to talk, was an example for the jury to consider and to follow in rendering its verdict.

2. A writ of certiorari should be granted because obviously this testimony was planned and deliberately considered by the prosecution as its answer to the petitioner's remaining silent and as a method of turning the conduct of the petitioner in expressing his election to remain silent into evidence to induce the jury to convict him contrary to the Fifth Amendment of the Constitution of the United States.

Special agent McLellan was investigating this case under Mr. Cecil, who is Intelligence Division Group Supervisor. Internal Revenue Code Section 7608 (b) (2) (A) and (B) grants to him authority "(A) to execute and serve search warrants and arrest warrants, (B) to make arrests without warrant."

Petitioner was, therefore, under compulsion when facing the agents, Mr. Morgan and Mr. McLellan on October 18, 1965, to talk or rely on his privilege to remain silent, and further he was under compulsion to talk or to decline to attend when three conferences were held later.

3. A writ of certiorari should be granted because the prosecution has now developed in this case an easy and practical method to take the right against self-incrimination from anyone accused of an attempt to evade tax. It is reasonable to anticipate a frequent use of this method if permitted to do so.

4. A writ of certiorari should be granted because the Opinion of the Court of Appeals imposes two new

limitations on the right to remain silent. The first is, that the testimony was not deliberately illicited, and the second is, that the petitioner cooperated with the agents after he had received advice to stand mute. (Opinion, page 3).

5. A writ of certiorari should be granted because the Trial Court commented to the jury on petitioner's failure to testify in his trial. This comment was an instruction to the jury:

> "One other thing ladies and gentlemen, the fact that this defendant did not take the stand in his own defense is a circumstance that shall not be considered by you and you shall not discuss it even in your deliberations in the jury." (R. 399, 290a).

This action of the Trial Court is in conflict with the Fifth Amendment of the Constitution of the United States.

Petitioner did not request an instruction on this fact. When the Trial Court inquired within hearing of the jury for objections to the charge, petitioner's counsel answered within hearing of the jury, "None, Your Honor." (R. 400, 291a).

This comment is in conflict with petitioner's right to stand mute, and to due process under the Fifth Amendment of the Constitution of the United States *Chapman* v. *State of California,* 386 U.S. 18; 87 S. Ct. 824; 17 L. Ed. 2d 805; *Griffin* v. *State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106.

6. The writ of certiorari should be granted because the petitioner has not received a fair trial by reason of a lack of any evidence in the record which tends to prove him guilty as charged in the indictment contrary to the due process clause of the Fifth Amendment of the Constitution of the United States.

Mr. B. Morgan is an internal revenue and certified public accountant. He testified for the government that he could not say that the items of currency which petitioner received from cash sales made to Louisville Scrap Material Company and Brodey and Brodey in the sum of $48,007.50 were not included in the $51,286.51 in currency receipts from cash sales as recorded in the Cash Receipts Journal and included in the tax returns. (R. 303, 224a).

Mr. Durbin Oldham is a certified public accountant, who prepared petitioner's books and prepared all of his tax returns during the years involved, testified for the government and concurred with the testimony of B. Morgan that he could not say that the government's figure of $48,007.50 in currency received from cash sales was not included in the petitioner's figure of $51,286.51 in currency receipts from cash sales as recorded in the Cash Receipts Journal and reported in the tax returns. (R. 84, 76a).

Mr. Robert A. Button is a certified public accountant and a former special agent of the Internal Revenue Service. He testified for the petitioner and he concurred with Mr. B. Morgan and Mr. Durbin Oldham that he could not say that the government's

figure of $48,007.51 was not included in the petitioner's figure of $51,286.51 and reported in the tax returns. (R. 351, 256a).

Petitioner's company sold finished auto parts on credit accounts to regular customers. It sold all scrap metal for cash, payable in currency, or by a check payable to cash or by a check payable to the company. The company sold no other products and made no sales of scrap metal to a person or firm other than Louisville Scrap Material Company and Brodey and Brodey during the years involved. (A very minor exception is an occasional cash sale at the front counter and not scrap metal.) Mr. Morgan could not identify an entry in the Cash Receipts Journal as being the record of a receipt of currency for the sale of anything other than scrap metal. (R. 304, 255a).

This is a controlling fact since the record shows sales of scrap metal only to Louisville Scrap Material Company and to Brodey and Brodey. There is no evidence that the Cash Receipts Journal is in error. Petitioner insists that the record is conclusive that the government did not prove him guilty as charged. The government did not produce evidence of a single cash sale of any product for currency to explain any items of the $51,286.51 which were recorded and reported in the tax returns. This burden was on the government to sustain the indictment.

The judgment of the Court of Appeals on this issue is contrary to the decisions in *Lockhart* v. *United States,* 183 F. 2d 265 (10th C. C. A.), *Canida* v. *United*

States, 250 F. 2d 822 (5th C. C. A.), and *United States* v. *Safur,* 251 F. 2d 30 (7th C. C. A.).

CONCLUSION

The questions raised in this petition are of great importance in preserving the full meaning of the Fifth Amendment of the Constitution of the United States. They are important in the correct administration of revenue provisions of 26 United States Code, Sections 7201, 7206(1), and 7608.

Respectfully submitted,

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